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**Author**

Blumberg, Grace

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# **CALIFORNIA'S ADOPTION OF STRONG DOMESTIC PARTNERSHIP LEGISLATION FOR SAME-SEX COUPLES**

**Grace Blumberg**

## **Abstract**

This chapter describes the history of California domestic partnership legislation, which culminated in the 2003 Domestic Partner Rights and Responsibilities Act. That legislation grants most of the state law rights and obligations of marriage to registered domestic partners. Although the legislation serves the goals of social inclusion, social solidarity, and social welfare, it does not meet the legal needs of same-sex couples and their children in two respects. First, California law defining the parent-child relationship contemplates ordinary sexual reproduction by opposite-sex couples and does not take into account the reproductive practices of same-sex couples. Supplementary legislation is required to ensure that parent-child relationships are equally recognized in families created by same-sex couples. Second, relatively few California same-sex couples have registered as domestic partners. The reasons for the low registration rate are various, and many have little to do with the character of a couple's relationship. Yet the infrequency of registration deprives economically weaker partners and their children of the protective benefits of marriage when a same-sex relationship terminates at death or permanent separation. To realize fully the social welfare functions of the law regulating the termination of formal conjugal relationships, some equivalent regulation should be extended to long-term stable conjugal relationships that have not been formalized by registration with the state.

In 1999, California enacted legislation permitting same-sex couples to register with the State as domestic partners.<sup>1</sup> The new legal status initially entailed few rights or obligations. Incremental legislation in 2001 granted registered domestic partners some of the many significant legal rights enjoyed by married partners.<sup>2</sup> In 2003, the legislature extended almost all the state law rights and obligations of marriage to registered domestic partners.<sup>3</sup> That legislation became effective on January 1, 2005.<sup>4</sup> Rejecting a constitutional challenge by Pete Knight, the sponsor of Proposition 22,<sup>5</sup> the California Court of Appeal held that the 2003 legislation does not violate Proposition 22.<sup>6</sup>

## **The California Approach**

From a national perspective, the 2003 California legislation was unique. Although the substance of the legislation is similar to earlier Vermont "civil union" legislation, the process by which the legislation was adopted differs significantly. Vermont civil union legislation was constitutionally compelled by the Vermont Supreme Court and thus enacted by a state legislature effectively deprived of legislative choice.<sup>7</sup> By contrast, California enactment of registered domestic partnership entailed a four-year legislative process, which began with recognition of a new legal status for same-sex

couples, a status initially lacking legal substance. As that status became understood and generally accepted, the legislature incrementally endowed it with legal substance. Unlike Hawaii,<sup>8</sup> Vermont<sup>9</sup> and Massachusetts,<sup>10</sup> where legislation recognizing same-sex conjugal relationships was constitutionally instigated or compelled and caused public dissension, the voluntary, gradual, consensus-building California legislative process did not generate public concern or political backlash.<sup>11</sup>

Although the 2003 California legislation is an American innovation<sup>12</sup> in its entirely legislative genesis, from the perspective of comparative law it is hardly novel. By 2003, most Western countries had already created a legal status, entailing rights and obligations, for registered same-sex couples.<sup>13</sup> Initially that status resembled California domestic partnership. Increasingly, those countries are additionally making marriage available to same-sex couples.<sup>14</sup> Responding to ever-rising rates of informal cohabitation in all Western countries, many of those countries have also created a legal status for unmarried or unregistered partners, opposite-sex and same-sex, who live in stable long-term cohabitation.<sup>15</sup>

In terms of broad social policy, the 2003 California legislation serves the goals of social inclusion, social solidarity, and social security.

*Social inclusion.* Whether or not a significant percentage of same-sex couples register as domestic partners in the short term, the availability of a legal institution that parallels marriage has great symbolic importance. It expresses tolerance, acceptance, and respect for the conjugal relationships of same-sex couples. Additionally, the availability of registered domestic partnership should have a positive effect on the mental and social well-being of gay and lesbian youth, most of whom are raised in heterosexual households.

Like their heterosexual counterparts, gay and lesbian youth can look forward to a full family life with a legally recognized partner and children, adopted or conceived by assisted reproduction. As with opposite-sex couples, legal recognition of same-sex couples should tend to strengthen and maintain their relationships by giving them a “socially endorsed, legally framed, normative template”<sup>16</sup> for their relationships. The 2003 legislation is noteworthy for its emphasis on responsibilities as well as rights. Earlier California legislation had largely extended rights without corresponding responsibilities.<sup>17</sup>

*Social solidarity.* Persons resisting legal recognition of same-sex relationships assert that it will undermine the institution of marriage,<sup>18</sup> and they often consider the truth of that assertion sufficiently self-evident to require no explanation. Arguably, however, it is not legal recognition of same-sex couples, but rather exclusion of same-sex couples from marriage or a parallel legal institution that may threaten the institution of marriage. Institutions tend to insure their viability by incorporating the excluded. When they do not, the excluded may become angry and obstreperous, and attempt to undermine the institutions that exclude them.<sup>19</sup> The United States has traditionally demonstrated unusual capacity for inclusion and assimilation. The 2003 California legislation exemplifies that tradition.

*Social security.* I use the term “social security” in its generic sense, as contrasted to the federal program of Old Age, Disability, and Survivors Insurance. By “social security,” I mean the basic services and goods necessary for human well-being, including health care, economic maintenance, education, and protection against life’s vicissitudes, including disability, old age, and unemployment. In the United States, the family is the cornerstone of individual social security. The family is a highly effective form of wealth redistribution. In the family, income is usually distributed from one adult to another and from adults to children.

While the family is intact, redistribution rarely requires any legal intervention, but relies instead on joint consumption in the household and ties of affection. When divorce terminates a marriage, the divorce court redistributes wealth in the form of property distribution, spousal support, and child support. When death ends a marriage, family wealth transmission is accomplished by community property distribution, the laws regulating intestate succession and, in the common law states, the surviving spouse’s elective share.

The second building block of American social security is our “employee welfare state.” Among Western nations, the United States is generally characterized as having an unusually underdeveloped public welfare state. This is surely true in terms of the individual’s entitlement to receive from the government the most basic aspects of social security. Nevertheless, the United States does have an elaborately developed employee welfare state in which legally recognized family relationships serve as the conduit for “fringe” benefits, such as health insurance, that flow from employers to employees and their family members. Those fringe benefits, although ostensibly an aspect of employee compensation, are highly subsidized by the public tax system and, in return, must conform to principles of welfare state redistribution rather than those of just compensation for work performed.<sup>20</sup>

In view of the role of family relationships in the distribution of social security in the American employee welfare state, membership in a lawfully recognized family is considerably more important in the United States than in countries with more highly developed welfare states. In those nations, each person, as a matter of right, may be individually entitled to government-provided aspects of social security.<sup>21</sup> In the American employee welfare state, to insure that derivative employee benefits reach an employee’s conjugal partner and the children with whom the employee and his partner share a household, state law must offer the possibility of legal recognition of the relationship between the conjugal partners and between each of them and their children. California’s 2003 domestic partner legislation has generally provided this opportunity to same-sex partners and their children.

### **The Federal Limitation**

Although the 2003 California legislation has given registered same-sex couples most of the California legal incidents of lawful marriage, California is powerless to grant same-sex couples the myriad federal incidents of marriage, which are denied to same-sex couples by the federal Defense of Marriage Act.<sup>22</sup> Thus the California legislation extends

the *inter se* rights and obligations of marriage to same-sex couples, but cannot grant any of the corresponding federal benefits, such as social security spousal benefits,<sup>23</sup> the estate tax marital exemption,<sup>24</sup> joint income tax filing,<sup>25</sup> tax-free division of property at dissolution,<sup>26</sup> exclusion of the value of employer-provided spousal health benefits from an employee's taxable income,<sup>27</sup> and the spousal-protection benefits of the Employment Retirement Income Security Act.<sup>28</sup> Legal commentators have noted that the mismatch between state domestic partnership law and federal non-recognition of state domestic partnerships creates potentially costly tax pitfalls for California registered domestic partners.<sup>29</sup>

For that reason, some commentators have even recommend that same-sex couples not register as California domestic partners.<sup>30</sup> The disjunction between California recognition of same-sex relationships and federal denial of recognition to same-sex relationships formalized under state law<sup>31</sup> cannot, of course, be cured by California. Instead, full equality for California registered domestic partners can only be achieved if the United States Congress follows the lead of California and repeals DOMA.

In the remainder of this chapter I discuss what remains to be done in California to establish parity between same-sex and opposite-sex couples, with particular attention to the establishment of parent-child relationships, and I consider the implications of the fact that most California same-sex couples are not registering as domestic partners.

### **Further Steps for California**

A substantial percentage of same-sex couples raise children in their households. The 2000 Census showed that 34 percent of female same-sex households and 22 percent of male same-sex households included a child under the age of eighteen, as compared with 46 percent of married-couple households and 43 percent of opposite-sex unmarried-couple households.<sup>32</sup>

The 2003 domestic partner legislation provides that “[the] rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.”<sup>33</sup> While the provision would appear to provide equality of treatment, the means of reproduction used by same-sex couples are usually different than those of opposite-sex couples. In order to treat all children equally, California law determining the existence of a parent-child relationship does not generally distinguish between married and unmarried couples. The law regulating parenthood in opposite-sex couples, married or unmarried, applies a series of presumptions based upon the likelihood that both partners are the biological parents of a child.<sup>34</sup> However, application of the presumptions of parenthood is inapt when we know, as a biological fact, that a child does not have two biological mothers or two biological fathers. Thus, the law regulating parentage for same-sex partners, registered or unregistered, must rely on notions of social and contractual parentage, as well as biological parentage.<sup>35</sup>

When a conjugal relationship ends, child support and child custody are not generally problematic with opposite-sex unmarried couples because parental obligations and rights arise from biological paternity or maternity, without regard to the character of

the relationship of a child's parents, that is, without regard to whether the parents bear any obligation to each other. However, child support and custody have been problematic with same-sex couples. Support and custody issues have arisen most frequently with lesbian couples who agree that one of them will bear a child and both of them will be parents to the child.<sup>36</sup>

Even though procreation and child-rearing was a joint enterprise, when lesbian partners separated, the intermediate California courts of appeal consistently declined to recognize a partner's claim to access to the child, i.e., to visitation or custody.<sup>37</sup> Later, the courts of appeal also declined to recognize a biological parent's claim to child support from a former same-sex partner.<sup>38</sup> Having initially responded negatively to lesbian partner claims to access,<sup>39</sup> the courts of appeal were unable to envisage how they could recognize child support claims in light of the reciprocity of the duty to support and the right of access.<sup>40</sup>

### **Resolving the Dilemma**

There are a number of ways to resolve this dilemma. The California Supreme Court took a stab at it when it decided three lesbian-parent cases in August, 2005. In two of these cases, a biological mother sought child support from a former lesbian partner.<sup>41</sup> And in the third case, an ovum donor sought to assert custodial rights to a child born to a former lesbian partner.<sup>42</sup>

In the support cases, the court appropriately required the former partners to pay child support. But to reach that result in one case,<sup>43</sup> the court distended and disfigured the California statutory scheme for determining the existence of a parent-child relationship where biology is the basis for the relationship. Perhaps to achieve some general symmetry between the imposition of support duties and custodial rights, in the third case the court allowed an ovum donor to assert custodial rights to a child on the ground that she was the child's "other parent," despite her formal agreement to serve as an anonymous donor and make no parental claims to the child.<sup>44</sup>

Justices Werdegarr and Kennard dissented sharply to the ovum donor decision, with Justice Werdegarr concluding that "[o]nly legislation defining parentage in the context of assisted reproduction is likely to restore predictability and prevent further lapses into the disorder of ad hoc adjudication."<sup>45</sup> Legislation is necessary not only to resolve the issues of assisted reproduction and parenting agreements of same-sex couples, but also to repair judicial damage to the carefully articulated statutory scheme for determining the parentage of children procreated by ordinary sexual reproduction.

### **Suggested Legislation**

The National Conference of Commissioners on Uniform State Laws and the American Law Institute (ALI) have addressed the issues, and they make similar recommendations. In 2002, the Commissioners approved amendments to the 1973 Uniform Parentage Act to provide rules for assisted reproduction. The amendments do not, however, appear to contemplate application to same-sex couples, although some of

them can be extended to same-sex couples without impairing their usual application to opposite-sex couples. California adopted the Uniform Parentage Act in 1975,<sup>46</sup> but has not yet adopted the 2002 amendments, which would generally clarify the law governing assisted reproduction. Although the California legislature might wish to revise a few of the 2002 amendments, they are generally sound and would bring a systematic and principled approach to assisted reproduction, sparing California from “the disorder of ad hoc adjudication.”<sup>47</sup>

Unlike the Uniform Parentage Act, which is concerned with establishment of the parent-child relationship, the ALI’s Principles of the Law of Family Dissolution<sup>48</sup> deal with the economic and custodial incidents of divorce or, in the case of nonmarital cohabitation, permanent separation. The Principles are thus concerned with the imposition of the parental duty to support a child and a parent’s right to access to a child, as opposed to the establishment of the parent-child relationship, a matter they leave to applicable state law. Unlike the Uniform Act, however, the Principles specifically include same-sex conjugal partners within the purview of their support and access rules. Thus, although the Principles do not speak to the determination of parenthood, with respect to same-sex partners and their children, they do address the two important legal incidents of parenthood, the duty to support and the right of access.

The revised Uniform Parentage Act and the Principles are notably similar in their liberal use of the doctrine of estoppel.<sup>49</sup> Even though a person might not be considered a parent under state law, that person or the child’s legal parent may be legally estopped to deny that the person is a parent.<sup>50</sup> For purposes of child support, the Principles provide that a person who is not a legal parent may nevertheless be estopped to deny a support obligation to a child.

### **Implications for Child Support**

Section 3.03 of the Principles states that a court “may...impose a parental support obligation upon a person who may not be the child’s parent under state law, but whose prior course of affirmative conduct equitably estops that person from denying a parental support obligation to the child.” Under section 3.03, estoppel may arise when “there was an explicit or implicit agreement or undertaking by the person to assume a parental support obligation to the child.” Alternatively, estoppel can arise if “the child was conceived pursuant to an agreement between the person and the child’s parent that they would share responsibility for raising the child and each would be a parent to the child.”

ALI commentary to the latter clause refers illustratively to “same-sex couples who wish to have children together [and] seek a sperm donation or surrogate mother, as the case may be.”<sup>51</sup> Thus, without characterizing the former cohabitant who agreed to assume parental status vis-à-vis her partner’s biological child as a legal parent, the Principles nevertheless estop a former cohabitant from denying a child support obligation when she has made an agreement to co-parent the child.

## **Visitation or Custody**

For purposes of access to the child, that is, for visitation and custody, section 2.03 of the Principles provides that a former cohabitant is a “parent by estoppel” under specified conditions. These conditions are met if she “lived with the child for at least two years or since the child’s birth, holding out and accepting full responsibilities as a parent pursuant to a co-parenting agreement with the child’s legal parent” or “is obligated to pay child support for the child because he or she is estopped to deny a child support obligation under section 3.03.” Thus, there can be no support obligation to a child without a corresponding right of access.

When only the second condition is satisfied, the right of access arises only after the legal parent seeks and secures child support. When the first condition is satisfied, the right to access arises independently of the imposition of a parental support obligation.<sup>52</sup> Adoption of the ALI estoppel provisions by California would directly and explicitly address the parental claims of same-sex partners. Adoption would support the parent-child relationships of both registered and unregistered domestic partners because it determines parent-child relationships without regard to whether the parenting couple’s relationship has been formalized. The ALI estoppel provisions are consistent with the Uniform Parentage Act’s guiding principle of the equality of children of married and unmarried couples.

The ALI estoppel provisions are also consistent with the Uniform Act’s 2002 estoppel provision, except that, unlike the Uniform Act, the Principles explicitly include same-sex partners. Thus, the California legislature should adopt the 2002 Uniform Parentage Act assisted-reproduction amendments, supplementing them with the American Law Institute’s formulation of the doctrine of estoppel to deny a parental relationship. Additionally, California parent-registration legislation should be extended to same-sex couples. That 1993 legislation facilitates a father’s voluntary declaration of paternity of a child born to an unmarried mother.<sup>53</sup> The voluntary declaration may be made only with the mother’s written consent.<sup>54</sup> With minor modification, the 2003 legislation would allow identification and registration of a child’s intended same-sex parents at the child’s birth. It would enable unregistered as well as registered same-sex partners to give legal effect to their co-parenting agreements, before any conflict has arisen between the same-sex partners.<sup>55</sup>

## **Domestic Partnerships and Family Law**

The 2003 domestic partnership legislation was a necessary, but not a sufficient, response to the family law needs of same-sex-couple households because a relatively small percentage of same-sex couples have registered as domestic partners. By 2003, four years after California enacted registration for same-sex partners, only 23 percent of the 92,138 California same-sex cohabiting couples identified by the 2000 Census had elected to register as California domestic partners.<sup>56</sup> This outcome is not peculiar to California. The same appears to be true in Vermont,<sup>57</sup> which made civil union available to same-sex couples in 2000, and the Netherlands, which offered registered partnership to same-sex couples in 1998 and lawful marriage in 2001.<sup>58</sup>



When a jurisdiction makes available domestic partnership or marriage, a relatively small percentage of same-sex couples sign up. This lack of propensity to formalize a relationship by registration with the state does not necessarily reflect on the quality or character of same-sex relationships, as compared to more marriage-prone opposite-sex relationships. Many other factors may explain the lack of propensity of same-sex couples to register or marry, particularly in the short term.<sup>59</sup>

## **Rights and Obligations**

There is substantial tension between the claims of unregistered couples to the rights and benefits of married couples, and their disinclination to register as domestic partners. Whatever their motivation for declining to register, they are effectively claiming the rights of marriage without assuming the reciprocal obligations.<sup>60</sup> Other countries have resolved this tension by extending to unmarried opposite-sex couples and unregistered same-sex couples many or all of the *inter se* property, support, and death obligations of marriage and some or all of the corresponding rights and benefits granted to registered and married couples. Canada, New Zealand, Australia, Great Britain, and most European countries have taken this path.<sup>61</sup> However, with the notable exception of Washington state,<sup>62</sup> American law has been unwilling to impose marital obligations on an unmarried or unregistered partner who did not voluntarily undertake them in some sort of contractual manner,<sup>63</sup> no matter how long or how marriage-like the relationship.<sup>64</sup>

Proponents of the American position justify it in a variety of ways. They often express concern about the personal autonomy of the parties or, in practical effect, just one of them.<sup>65</sup> In other words, a person should be free to define the terms of his or her most intimate relationship to the extent of declining to assume any obligation for the well-being of a nonmarital or unregistered partner.<sup>66</sup> Consequently, proponents conclude that, as a rule of law and a matter of contractual interpretation, the law should infer no mutual obligation, absent an agreement of the parties to the contrary. This justification of the American position may be understood to value personal autonomy more highly than social justice, whereas the approach of other countries would seem to prefer social justice to personal autonomy. On the other hand, proponents of the American view also express disapproval of conjugal partners, same-sex and opposite-sex, who cohabit without formalizing their relationship, on the ground that nonmarital cohabitation is essentially different from and morally inferior to marriage.<sup>67</sup>

Failure to formalize a relationship is often interpreted as evidencing a lesser commitment to one another than that presumably felt by married or registered partners.<sup>68</sup> Lesser commitment is also inferred from the greater frequency with which informal relationships, as compared to marriages, fail to endure until the death of one of the parties. Yet this justification of the American position seems somewhat circular. Commitment to one another and the durability of a cohabiting relationship are inextricably bound up with legal recognition of the relationship, that is, with the existence of moral and legal obligation. In declining to impose reciprocal obligations on informal cohabitants, American law necessarily fosters lesser commitment and easier exit, both legally and normatively. Thus American law tends to reinforce that which its proponents disapprove.

## **Children's Interests**

When it comes to children, more is at stake than the *inter se* interests of unregistered, or unmarried, cohabitants. American law divides the economic incidents of marriage dissolution into three categories: property division, spousal support, and child support. However, from the perspective of a child of a failed relationship, all three economic incidents equally bear on the child's post-dissolution economic well-being because the child shares a household and, consequently, a standard of living with his custodial parent. The child's economic well-being directly reflects that of his custodial parent. Thus, from the child's perspective, the law's distinction between property distribution, spousal support, and child support is illusory.

This perspective is recognized by courts at divorce when they take children's needs into account in allocating the community property<sup>69</sup> and awarding spousal as well as child support to the parent caring for children, particularly when the age or condition of the children limits the custodial parent's availability for market employment. But the failure of American law to recognize, for purposes of *inter se* rights, the long-term relationships of unmarried opposite-sex couples and unregistered same-sex couples puts the children of those relationships at a distinct disadvantage should the relationship break down.

Historically, children of unmarried parents were treated as "illegitimate" and had fewer rights than marital children. However, in a series of decisions, the United States Supreme Court required that illegitimate children be treated equally with children conceived in lawful wedlock.<sup>70</sup> Accordingly, California has abolished the status of illegitimacy, and treats all children equally for purposes of child support. Nevertheless, unequal economic treatment persists in California's failure to recognize *inter se* economic rights between the child's unmarried, or unregistered, cohabiting parents.

## **The Trend in Cohabitation**

More broadly, the lack of propensity of same-sex couples to register their partnership is echoed in the increasing percentage of opposite-sex cohabiting couples who do not register their relationships with the state, that is, who do not marry. Unlike other Western countries, American law has not responded adequately to the dramatic rise in non-marital cohabitation experienced by all Western countries. The 2000 Census showed nine unmarried-opposite-sex-couple households for every 100 married-couple households. The percentage of unmarried-couple households increased nine fold from 1970, when there was 1 unmarried couple for every 100 married couples. Thus, eight percent of American opposite-sex cohabiting couples are not married, while approximately 75 percent of California same-sex couples are not registered.<sup>71</sup>

## **Creating a New Status**

With the exception of the United States, the almost universal response to nonmarital cohabitation and, more recently, unregistered same-sex cohabitation, has been to create a new status recognizing stable cohabiting relationships of significant duration.

Recognition turns on the objective behavior of the parties rather than, as in American law, their subjective intent and agreement to be bound by mutual obligations. If California were to follow the international trend and adopt a status regime, under other prevailing principles of California law the parties would probably be permitted, like couples who plan to marry, to contract out of those obligations. However, those persons who do not enter formal “premarital” contracts would be bound by the status-imposed obligations, as are married persons.<sup>72</sup> Principles of justice and social welfare undergird the nearly universal status response to nonmarital cohabitation.

Family law, in its allocation of rights and responsibilities, recognizes and responds to the dependence and vulnerability that arises from family relationships, particularly conjugal relationships.<sup>73</sup> Yet the existence of dependence and vulnerability does not depend on the formality of a relationship. On the contrary, dependence and vulnerability may be equally great, or even greater, in informal than in formal relationships.<sup>74</sup> Like marriage, long-term cohabiting relationships may predictably have long-term consequences, both economic and procreative, for the participants and their offspring, if any. Persons who voluntarily enter such relationships should be held accountable for such consequences at the dissolution of the relationship to the extent that a married person would be held accountable at the dissolution of a marriage.

### **Alternative Models**

The law of New Zealand provides a comprehensive model. In 2001, New Zealand enacted legislation equating long-term cohabitation (more than three years) with marriage for purposes of spousal support, property distribution and death rights. The legislation covers same-sex, as well as opposite-sex, couples.<sup>75</sup> Legislation enacted by the Canadian province of Ontario is more modest in its goal but more expansive in its coverage. It treats cohabitants as spouses for purposes of spousal support, but not property distribution. Consistent with Ontario’s concern about public welfare and, more particularly, child welfare, the legislation includes as a “spouse” “either of a man and a woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.”<sup>76</sup>

The Supreme Court of Canada has held that the equal protection clause of the Canadian Charter requires that same-sex couples be included within the protective coverage of the statute.<sup>77</sup> The Court observed that financial dependency and interdependency are no less likely in same-sex cohabitation than in opposite-sex cohabitation. Therefore, the Court reasoned, the exclusion of same-sex cohabiting couples was not rationally connected to the statute’s objective of assuring adequate economic support for cohabitants at the termination of a relationship.

Domestically, the American Law Institute has provided a somewhat more complex model. In concept, the ALI’s Principles of the Law of Family Dissolution define “domestic partners” as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”<sup>78</sup> In application, cohabitants are domestic partners if they share a

common household with a child of both of them for a specified period of time, illustratively two years.<sup>79</sup>

When cohabitants are not the co-parents of a child, the Principles *presume* that they are domestic partners if they share a common household for a specified period, illustratively three years. The presumption may be rebutted by a showing that the parties did not in fact share life together as a couple, as that phrase is defined in guidelines for determining whether parties shared life together as a couple.<sup>80</sup> If neither the absolute rule nor the presumption applies, the claimant bears the burden of showing that for a significant period of time the parties shared a primary residence and life together as a couple within the meaning of the guidelines. Whether the period of time was significant largely turns on the extent to which cohabitation worked irrevocable change in the life of one or both parties.<sup>81</sup> When parties are determined to be domestic partners, unless they have made an enforceable written agreement setting different terms, the Principles treat them much like spouses for purposes of spousal support and property distribution.<sup>82</sup>

As compared to the New Zealand and Ontario statutes, which rely entirely on readily ascertainable documentary evidence, in some relatively few cases the ALI formulation might require extensive fact-finding. In most cases, however, the ALI formulation would require the same documentary evidence as the New Zealand and Ontario statutes. By contrast, the prevailing contractual rubric of most American states necessarily involves extensive fact-finding about highly subjective aspects of the parties' personal lives and usually relies on largely unreliable uncorroborated testimony of oral statements, or the lack thereof, provided by self-interested cohabitants. The contractual rubric, often called the *Marvin* rubric, after the California Supreme Court case in which it was developed,<sup>83</sup> has proven difficult and time-consuming to administer and unavailing to vindicate even the most compelling and poignant economic claims at the termination of a long-term cohabitation.<sup>84</sup>

### **Rethinking the California Approach**

California's adoption of the new status of registered domestic partnership and recognition of the extent to which same-sex couples are not enrolling in that new status, offers us a new opportunity to re-evaluate the state's public policy in this emerging area. We need to consider ways in which American law, and California law particularly, fails to respond to the needs of unregistered same-sex and unmarried opposite-sex cohabitants and their children when those relationships terminate at dissolution or death.

Virtually all other Western countries have followed a two-track approach to conjugal relationships. They have expanded marriage to include same-sex couples or have offered them a close equivalent, such as domestic partnership. At the same time, responding to rapidly increasing rates of unregistered conjugal relationships, same-sex and opposite-sex, those countries have embraced status-based recognition of stable long-term cohabiting relationships. In addition to recognizing claims of the parties against one another at dissolution by separation or death, those countries have often extended status-based recognition to many of the myriad rights and benefits that flow to married persons from the government and third parties.

In the United States, the California legislature was the first state legislature voluntarily to create a legal status for same-sex couples and, after a course of incremental legislation, endow that status with almost all the rights and obligations of marriage. For California registered domestic partners, there is not a great deal more that the legislature can do, other than augment California parentage laws to take into account the procreative practices and parental arrangements of same-sex couples. However, having followed other Western countries down the first track, the California legislature ought now turn its attention to the legal needs of unregistered same-sex and unmarried opposite-sex couples and to those of their children. California needs to consider the extent to which the contractual rubric developed by its state courts has proven inadequate to respond to those needs.<sup>85</sup>

## Endnotes

<sup>1</sup> Domestic Partners, ch. 588, 1999 Cal. Stat. 3372, effective January 1, 2000.

<sup>2</sup> Domestic Partnerships, ch. 893, 2001 Cal. Stat. 5634.

<sup>3</sup> Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586.

<sup>4</sup> *Id.*, § 14.

<sup>5</sup> Known as the “Defense of Marriage Initiative,” Proposition 22 is codified in Family Code § 308.5, which provides: “Only marriage between a man and a woman is valid or recognized in California.”

<sup>6</sup> *Knight v. Superior Court*, 128 Cal.App.4<sup>th</sup> 14, 26 Cal.Rptr.3d 687 (2005), review denied, held that enactment of the 2003 domestic partner legislation without voter approval did not amend § 308.5 (Proposition 22, the Defense of Marriage Initiative) and therefore did not violate the Article II, § 10(c) of the California Constitution, which requires an initiative to amend an initiative.

<sup>7</sup> In *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Vermont Supreme Court held that the exclusion of same-sex couples from the protective status of marriage, including all its rights and benefits, violated the Vermont Constitution's *common benefit* clause, which provides that the government is “instituted for the common benefit, protection, and security of the people, nation, and community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.” Vt. Const. ch. 1, art. 7. *Baker* offered the Vermont legislature two alternatives: opening marriage to same-sex couples, or extending to same-sex couples all the legal incidents of marriage. *Id.* at 867. Choosing the second option, the Vermont legislature offered same-sex couples a “civil union,” which includes all the state law incidents of a Vermont marriage. An Act Relating to Civil Unions, 1999 Vt. Acts & Resolves 91, codified at VT. STAT. ANN. tit. 15, §§ 1201-1207.

<sup>8</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>9</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>10</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (the equal protection and due process clauses of the Massachusetts Constitution require that same-sex couples be granted access to marriage); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (civil union legislation, as contrasted to marriage, would not satisfy the equal protection and due process clauses of the Massachusetts Constitution).

<sup>11</sup> The proponents of Proposition 22 were unable to gather sufficient signatures to qualify for a ballot referendum that would abrogate the 2003 domestic partner law in either of the two elections following its enactment. Telephone conversation with Jon Davidson, Senior Counsel, Lambda Legal (Jan. 20, 2004). The lack of public concern about the California legislature's 2005 enactment of same-sex marriage legislation is also attributable to the incremental nature of legislative reform and the impact of the legislative campaign on popular opinion. The same-sex marriage legislation was ultimately vetoed by Governor Schwarzenegger not on the ground that it was intrinsically undesirable, but rather than it was inconsistent with Proposition 22. In 1999, Proposition 22 was approved by 61 percent of the electorate. By 2005, Californians were evenly divided on the issue of gay marriage. Nancy Vogel and Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, Los Angeles Times, September 30, 2005, B3, available at <http://www.latimes.com/news/local/la-me-gays30sep30.1.3320417.story?coll=la-headlines-california>.

<sup>12</sup> Other states have since followed California's entirely legislative path to recognition of same-sex conjugal relationships. On April 20, 2005, the governor of Connecticut signed into law an act recognizing “civil unions” for same-sex couples. That law became effective on October 1, 2005. Cara Rubinsky, *Civil Union Law Takes Effect in Conn.*, Washington Post, October 2, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/01/AR2005100100703.html>. In April 2005 the governor of Oregon asked the legislature to send him civil union legislation, which is reported to have bi-partisan legislative support. Brad Cain, *Oregon governor pushing for civil unions law*, Seattle Times, April 13, 2005, available at: [http://seattletimes.nwsourc.com/html/nationworld/2002240239\\_weborecivilunions13.html](http://seattletimes.nwsourc.com/html/nationworld/2002240239_weborecivilunions13.html). Weaker forms of domestic partnership legislation have been adopted by Pennsylvania, Maine, and the District of Columbia.

<sup>13</sup> Statutes are collected in Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 U.C.L.A. Law. Rev. 1555, 1572-1573 (2004).

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<sup>14</sup> *Id.* The Netherlands, Belgium, and Spain have opened the status of marriage to same-sex couples. Act on the Opening Up of Marriage (Netherlands); Loi ouvrant le mariage à des personnes de même sexe, 2003 (Belgium). On June 30, 2005, the Spanish Parliament approved same-sex marriage legislation. Washington Post, July 1, 2005, A14. Sweden and Taiwan are currently drafting same-sex marriage legislation. The courts of Canada and South Africa have decided, as a constitutional matter, that same-sex couples may not be excluded from marriage. On June 28, 2005, the Canadian House of Commons passed a same-sex marriage bill.

<sup>15</sup> Blumberg, *supra* note 13, at 1573-1575.

<sup>16</sup> Robert-Jay Green and Valory Mitchell, *Gay and Lesbian Couples in Therapy: Homophobia, Relationship Ambiguity, and Social Support*, in CLINICAL HANDBOOK OF COUPLE THERAPY 552 (A.S. Gurman & N.S. Jacobson eds., 3d ed. (2002)).

<sup>17</sup> For further discussion of the relationship between rights and responsibilities, see Grace Ganz Blumberg, *The Regularization of NonMarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L.REV. 1265, 1267, 1271-1275, 1282-1292 (2001) and Blumberg, *supra* note 13, at 1566-1567.

<sup>18</sup> See discussion of the California “Defense of Marriage” initiative, *supra* notes 5-6, and the federal Defense of Marriage Act (DOMA), Pub. L. 104-199, 110 Stat. 249 (1996), codified at 28 U.S.C. § 1738. DOMA is discussed at note 22 *infra*.

<sup>19</sup> The denial of access to marriage experienced by same-sex couples has fueled gay and lesbian hostility to marriage as an institution and the radical feminist project to dismantle the traditional nuclear family in order to undermine the patriarchal power of men. Blumberg, *supra* note 13, at 1614 and *supra* note 17, at 1275-1276

<sup>20</sup> For example, to secure favorable tax treatment, employers must adhere to nondiscrimination rules that deter them from providing superior benefits to highly compensated employees. Internal Revenue Code § 410(b), 26 U.S.C. § 410(b).

<sup>21</sup> The central significance of the role of the family in the distribution of American social security is underscored by the relatively early, often successful campaign to persuade employers to treat same-sex couples equally with opposite-sex married couples in the distribution of derivative employment benefits, that is, spousal and child benefits. See Blumberg, *supra* note 17, at 1282-1292.

<sup>22</sup> Defense of Marriage Act (DOMA), Pub. L. 104-199, 110 Stat. 249 (1996), codified at 28 U.S.C. § 1738 (states are not required to recognize sister-state same-sex marriages) and 1 U.S.C. § 37 (for purposes of federal law, “spouse” refers only to a person married to a person of the opposite sex). The latter provision denies California registered same-sex couples an estimated 1,138 federal benefits and protections. See, e.g., Diana Richmond, *Tax Pitfalls under the California Domestic Partnership Act*, 2004 CALIFORNIA FAMILY LAW MONTHLY 346 (December).

<sup>23</sup> 42 U.S.C. § 402(b) and (c).

<sup>24</sup> Internal Revenue Code § 2056, codified at 26 U.S.C. § 2056.

<sup>25</sup> Internal Revenue Code § 1(a), codified at 26 U.S.C. § 1(a).

<sup>26</sup> Internal Revenue Code § 1041, codified at 26 U.S.C. § 1041.

<sup>27</sup> Married employees may exclude spousal coverage from taxable income. Domestic partners may exclude partner benefits from taxable income only if the partner is a dependent of the employee. Internal Revenue Code §§ 105(B), 106, and 152.

<sup>28</sup> Not recognizing an employee’s domestic partner as a “spouse” because of DOMA, ERISA would not require the domestic partner’s consent if the employee were to choose to take a pension for his life only, as it would with a married couple. Moreover, at dissolution of a domestic partnership, a former domestic partner would not be eligible for a spousal Qualified Domestic Relations Order (QDRO).

<sup>29</sup> See, for example, Diana Richmond, *supra* note 22.

<sup>30</sup> See, for example, Frederick Hertz, *The Expansion of California's Domestic Partnership Law: Discerning the Uncertain Impacts of AB 205*, Association of Certified Family Law Specialists Newsletter, Fall 2004, No. 2, at 1, 17-21, available at [http://www.samesexlaw.com/html/articles\\_by/ACFLS\\_Newsletter.pdf](http://www.samesexlaw.com/html/articles_by/ACFLS_Newsletter.pdf). For similar commentary on the income tax effects of Massachusetts same-sex marriage, see Aude Lagorce, *Gay Wedding Windfall? Not at Tax Time*, forbes.com, available at [http://www.forbes.com/2004/04/08/cx\\_al\\_0408gaymarriage\\_print.html](http://www.forbes.com/2004/04/08/cx_al_0408gaymarriage_print.html). The unusually high rate of termination during the opt-out period provided by the 2003 California legislation for domestic partners who registered earlier under far weaker legislation may be at least partly attributable to such advice.

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<sup>31</sup> California's classification of registered same-sex couples as domestic partners, rather than married persons, should have no bearing on their recognition by federal law because federal spousal benefits generally are not restricted to lawfully married spouses. The Social Security Act, for example treats a person as the "spouse" of a primary beneficiary if that person is lawfully married to the primary beneficiary *or* the courts of the state in which the primary beneficiary is domiciled would accord that person the same status as a spouse in the devolution of the primary beneficiary's intestate personal property. 42 U.S.C. 416(h)(1)(A)(1). A registered domestic partner is treated as a spouse for purposes of California intestacy law. California Probate Code §§ 37 and 6401(c). Instead, the federal impediment to recognition is the DOMA restriction of the federal definition of "spouse" to a person of the opposite sex. See note 22 *supra*. With respect to the Social Security Act, however, DOMA may be ineffective to accomplish its purpose because federal social security entitlement of California registered domestic partners turns not on being a spouse, but being entitled to intestacy benefits just as a spouse would be.

<sup>32</sup> Tavia Simmons & Martin O'Connell, U.S. Dep't of Commerce, Married-Couple and Unmarried-Partner Households: 2000, at 9, available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

<sup>33</sup> California Family Code § 297.5 (d).

<sup>34</sup> California Family Code §§ 7611 and 7612.

<sup>35</sup> When female same-sex partners co-parent, generally one partner is a biological parent while the other is a social parent. When male same-sex partners co-parent, one or both may not be the child's biological parent.

<sup>36</sup> See cases cited in note 37 *infra*. Although recognizing that the partners agreed that they would both be parents to the child in question, some courts have nevertheless responded that one cannot become a parent by contract. See Kristine Renee H. v. Lisa Ann R., 16 Cal.Rptr.3d 123 (2004), superseded and decided on another ground by the California Supreme Court in Kristine H. v. Lisa R., 37 Cal.4th 156, 117 P.3d 690, 33 Cal.Rptr.3d 81 (2005). The depublished opinion of the court of appeal concluded that a pre-birth judgment of parentage based on the same-sex partners' stipulation that they intended to be the joint parents of the unborn child was void because parentage may not rest simply on the parties' agreement. (When the California Supreme Court grants review, the decision of the intermediate court of appeal is "depublished," or superseded, and the case is reviewed on the basis of the trial court record.) To the same effect, see T.F. v. B.L., 813 N.E.2d 1244 (2004), in which the Massachusetts Supreme Judicial Court held, 4 to 3, that even though the trial court found that female same-sex partners agreed to create a child and they accomplished their agreement by the artificial insemination of one of them, the partner could not become a parent by agreement.

<sup>37</sup> See, for example West v. Superior Court, 69 Cal.Rptr.2d (1997); Nancy S. v. Michelle G., 279 Cal.Rptr.212 (1991); Curiale v. Reagan, 272 Cal.Rptr. 520 (1990).

<sup>38</sup> See, for example, the depublished court of appeal opinion in Maria B. v. Superior Court, 13 Cal.Rptr.3d 494 (2004). *Maria B.* was disapproved on another ground by the California Supreme Court as *Elisa B. v. Superior Court*, 37 Cal.4th 108, 117 P.3d 660, 33 Cal.Rptr.3d 46 (2005).

<sup>39</sup> See cases cited *supra* note 36.

<sup>40</sup> See, for example, the depublished opinion of the court of appeal opinion in *Maria B.*, *supra* note 38 ("it is unfair for the court to impose a child support obligation under an estoppel theory when the court cannot grant and enforce parental rights, such as custody and visitation"). For further discussion of this issue, see Blumberg, *supra* note 13, at 1600-05. See particularly note 236.

<sup>41</sup> Kristine H. v. Lisa R., 37 Cal.4th 156, 117 P.3d 690, 33 Cal.Rptr.3d 81 (2005) and *Elisa B. v. Superior Court*, 37 Cal.4th 108, 117 P.3d 660, 33 Cal.Rptr.3d 46 (2005).

<sup>42</sup> K.M. v. E.G., 37 Cal.4th 130, 117 P.3d 673, 33 Cal.Rptr.3d 61 (2005).

<sup>43</sup> *Elisa B.*, *supra* note 38.

<sup>44</sup> In *K.M.*, *supra* note 42, the gestational mother did not seek child support from the ovum donor. However, the court may have been concerned about imposing a support duty in two cases if it were to find no right of access in the third case.

<sup>45</sup> 37 Cal.4th at 155. For criticism of all three decisions, see Grace Ganz Blumberg, *Commentary*, 2005 California Family Law Monthly, Issue No. 10 (October).

<sup>46</sup> 1975 Cal. Stat., ch. 1244, now codified at Family Code §§ 7600-7650.

<sup>47</sup> 37 Cal.4th at 155 (dissent of Justice Werdegar).

<sup>48</sup> See American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002), §§ 3.03 and 2.03.



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<sup>49</sup> Compare *id.* with 2002 Uniform Parentage Act Amendments, § 6.08, reprinted at 37 Fam. L.Q. 5, 11 (2003). “[E]quitable estoppel, reduced to its essence, is a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should have known that the other would rely upon that conduct to his detriment.” *L.S.K. v H.A.N.*, 813 A.2d 872, 877 (Pa.Super. 2002), quoting *Commonwealth ex rel Gonzalez v. Andreas*, 369 A.2d 416, 418 (Pa.Super. 1976) (invoking the doctrine of equitable estoppel to hold that a woman had a duty to pay child support to her former lesbian partner when, during their relationship, the parties had agreed that one would conceive children and both would be parents to the children).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, § 3.03 cmt c.

<sup>52</sup> A third category of parent by estoppel has little relevance for same-sex couples. A person is also a parent by estoppel if he “believed he was the child’s biological parent and fully accepted the responsibilities of a parent.” Principles, *supra* note 48, § 2.03 (1). Effectively, in § 2.03 (1) the Principles do not extend the status of legal parent to social parents, but instead recognize three types of social parents by equitably estopping the child’s legal parent from asserting the social parent’s lack of legal status. In all three cases, the child’s legal parent has consented to the social parenthood of the claimant, either by representing to a partner that he is the biological parent, entering a co-parenting agreement with a partner, or obtaining parental child support from a former partner. Of course, recognition of a co-parent’s right of access to a child vindicates not only that person’s associational interests, but also serves the child’s interest in preserving a relationship with a person who has been a social parent to the child.

<sup>53</sup> Stats. 1993, ch. 1240 (A.B. 1277), codified at Family Code §§7570-7577. Although declarations are frequently made postpartum in the hospital, a declaration may also be made before the child’s birth or at any time after birth.

<sup>54</sup> Family Code § 7574(5).

<sup>55</sup> For further discussion, see Diana Richmond, *Using the “Pop Dec,”* 2005 California Family Law Monthly 198 (August issue).

<sup>56</sup> Assembly Member Jackie Goldberg, who sponsored the legislation that became effective in 2005, reported in 2003 that 21, 471 couples were registered with the California Secretary of State, representing 23 percent of the California same-sex couples identified by the 2003 Census. (The 2003 Census, which reports same-sex couples sharing living quarters and having a close personal relationship with each other, is generally understood to underestimate the number of same-sex couples, although analysts vary on the extent of that underestimation. For citation and analysis of sources, see Blumberg, *supra* note 13, at note 72. In 2003, existing domestic partner legislation provided registered domestic partners with many of the benefits but virtually none of the obligations of marriage. Thus, the low rate of take-up is particularly striking, and it cannot reasonably be attributable to any motive to avoid the obligations of marriage, for they were largely absent from the pre-2005 legislation.

<sup>57</sup> The corresponding figure for Vermont is 27 percent of Vermont same-sex cohabiting couples registered in same-sex civil unions. Sondra E. Solomon et al., *Pioneers in Partnership: Lesbian and Gay Male Couples in Civil Unions Compared with Those Not in Civil Unions and Married Heterosexual Siblings*, 18 J. Fam. Psychol. 275, 275-276 (2004).

<sup>58</sup> In 2002, only 15 percent of Dutch same-sex cohabiting couples were married or registered partners. Blumberg, *supra* note 13, note 182.

<sup>59</sup> I identify and examine these factors in Blumberg, *supra* note 13, at 1587-1590. See as well text and notes at notes 22-30 *supra*. For an excellent study of the determinants of the decision to register for Vermont civil unions, see Solomon, *supra* note 57, at 276-281 (2004). The authors did not find significant differences in the character of the relationships of same-sex Vermont couples who did and did not opt for Vermont civil union. It did, however, find differences in openness about sexual orientation (openness correlated with registration) and closeness to family of birth (closeness correlated with registrations). *Id.* at 284. What was striking about the study were the similarities between the three groups in terms of the characteristics of the relationship, such as, holding a home in their joint names, holding joint bank accounts, and feeling “married” to a partner. A strong majority of partners in all three groups shared the same characteristics. *Id.* at 279, 281. Other similar findings are summarized in Blumberg, *supra* note 13, at note 190.

<sup>60</sup> “Rights without responsibilities” was the implicit theme of California legislation until the 2003 Domestic Partner Rights and Responsibilities Act.

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<sup>61</sup> I explore the history of Canadian case law and legislation in Blumberg (UCLA), *supra* note 13, at 1580-85. New Zealand statutory history is traced *id.* at 1574-75, and Australian and European statutes are discussed and cited *id.* at 1571-1575 and accompanying notes. Most recently, Great Britain has enacted registered "civil partnership" legislation, effective December 5, 2005.

<sup>62</sup> At the termination of a stable long-term cohabiting relationship, Washington, a community property state, divides property acquired during the relationship according to community property principles. *Connell v. Francisco*, 898 P.2d 831, 835-37 (Wash. 1995); *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984). Although the case law doctrine has traditionally been applied to opposite-sex couples, the Washington Supreme Court has suggested, in dictum, that it should be equally available to same-sex couples. *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001). Subsequently, *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004), affirmed a trial court decision applying that dictum to the division of the assets and the liabilities of separated same-sex partners.

<sup>63</sup> The leading American case is the California Supreme Court's decision in *Marvin v. Marvin*, 557 P.2d 106 (Cal.1976). *Marvin* adopts the view that nonmarital cohabitation should be regulated by contract law rather than family law. *Marvin* would enforce an agreement of the parties to assume obligations to one other, but would not otherwise impose any legal obligations at the end of stable, long-term cohabitation.

<sup>64</sup> See, for example, *Friedman v. Friedman*, 24 Cal.Rptr.2d 892 (Cal. Ct. App. 1993) (recognizing no property or support rights at termination of a 21-year procreative cohabitation); *Rissberger v. Gorton*, 597 P.2d 366 (Or. Ct. App. 1979) (at termination of a long procreative cohabitation found an implied contract that the household items were owned jointly but found no implied contract with regard to other property held solely by male partner, and denied any other claims).

<sup>65</sup> Although proponents refer to the autonomy and self-determination of "the parties," and the right of the parties to define their relationship, the issue of rights and obligations does not arise unless one party seeks to assert rights against the other.

<sup>66</sup> Commentators offering this justification are also prone to advocate full freedom of premarital contract, that is, premarital agreements waiving spousal support and property rights at divorce and death should be equally enforceable without regard to the circumstances of the parties at divorce or death. See Blumberg, *supra* note 17, at 1295-1299, 1302-1309.

<sup>67</sup> See, e.g., Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame L.Rev.1435 (2001); *Postmodern Family Law: Toward a New Model of Status*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 157, 168-70 (David Popenoe et al. eds. 1996).

<sup>68</sup> *Id.*

<sup>69</sup> See, for example, California Family Code §§ 3800-3809, providing that the divorce court may delay sale of the family home and award its temporary use and possession "to a custodial parent of a minor child... in order to minimize the adverse impact of dissolution of marriage...on the welfare of the child.

<sup>70</sup> For citation and discussion of those cases, see Michael Grossberg, *How to Give the Present a Past? Family Law in the United States 1950-2000*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 3, 8-10 (Sanford N. Katz et al. eds., 2000).

<sup>71</sup> The Census data is collected and discussed in *Blumberg*, *supra* note 13, at 1568-1570.

<sup>72</sup> Consistent with its emphasis on personal autonomy, the law regulating premarital contracts in some American states, including California, is far more permissive than other Western and English-speaking countries. New Zealand, for example, would enforce a property waiver only if it is not "clearly unfair" to one of the parties at the termination of their relationship. Property (Relationships) Amendment Act, 2001, §§ 21, 21J (N.Z.), available at [http://www.brookers.co.nz/property\\_act/default.htm](http://www.brookers.co.nz/property_act/default.htm). England allows the divorce court to vary a premarital property waiver for the benefit of a party or a child of the parties. English Matrimonial Causes Act, 1973, § 24 (Eng.). For discussion of this provision, see 13 HALSBURY'S LAWS OF ENGLAND ¶ 1136 (4<sup>TH</sup> ed. 1973). Similarly British Columbia allows the divorce court to ignore the property terms of a premarital agreement that "would be unfair" in light of a wide variety of equitable considerations. Family Relations Act of British Columbia, 1996, R.S.B.C., ch. 128, § 65 (Can.). None of these jurisdictions would enforce a premarital waiver of spousal support. By contrast, California readily enforces property waivers without regard to their fairness at the time of enforcement and enforces support waivers so long as they are not "unconscionable" at the time of enforcement. See California Family Code §§ 1610-1620.

<sup>73</sup> See Regan, *Postmodern Family Law*, *supra* note 67, at 168-70.

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<sup>74</sup> To the extent that the absence of marriage or registered partnership reflects power inequality in a conjugal relationship, the partner with less power is likely to be even more dependent and vulnerable than his or her married or registered counterpart.

<sup>75</sup> Property (Relationships) Amendment Act, 2001, available at [http://www.brookers.co.nz/property\\_act/default.htm](http://www.brookers.co.nz/property_act/default.htm).

<sup>76</sup> Ontario Family Law Reform Act of 1978, R.S.O., ch. 2, § 14 (b), as amended by Ontario Family Law Reform Act of 1986, R.S.O., ch. F-3, §§ 29-30.

<sup>77</sup> *M. v. H.* [1999] D.I.R. 577.

<sup>78</sup> § 6.03(1).

<sup>79</sup> § 6.03 (3)-(4).

<sup>80</sup> § 6.03 (3)-(4), (7).

<sup>81</sup> § 6.03(6).

<sup>82</sup> § 6.01(2).

<sup>83</sup> 557 P.2d 106 (Cal. Sup. Ct. 1976). *Marvin* is discussed *supra* note 63.

<sup>84</sup> See cases cited and described in note 64 *supra*. For citation of American legal commentary criticizing *Marvin*, pointing out the extent to which it does not respond to the needs of cohabiting couples, and advocating a status approach to cohabitation, see Blumberg, *supra* note 17, at notes 2 and 4.

<sup>85</sup> For discussion of the inadequacy of the contractual rubric, see Principles, § 6.03, at 931-937, and critical commentary cited in Blumberg, *supra* note 13, at notes 136, 139, and 140.